

IN THE  
SUPREME COURT FOR THE UNITED STATES  
October Term, 1977

THE PEOPLE OF THE STATE OF MICHIGAN,  
Petitioner,  
vs.  
GARY DeFILLIPPO,  
Respondent.

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No. 77-1680

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Gary DeFillippo, asks leave to proceed in forma pauperis in this matter as he was adjudged indigent in this matter by the state trial court (See attached) and an affidavit of indigency would be forthcoming.

DEFENDERS' OFFICE - LEGAL AID  
AND DEFENDER ASSOC. OF DETROIT

BY:

Thomas M. Loeb  
THOMAS LOEB (P 25913)  
Attorney for Respondent  
462 Gratiot Avenue  
Detroit, MI 48226  
965-4384

Arthur J. Tarnow  
ARTHUR J. TARNOW  
Attorney of Counsel for Respondent  
1405 Lafayette Building  
Detroit, MI 42826  
963-4090

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vs.  
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No. 77-1680

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE MICHIGAN SUPREME COURT

- BRIEF FOR RESPONDENT IN OPPOSITION -

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported  
80 Mich App 197, 262 NW2d 921 (1977) (App. A of Petition). The  
Order of the Michigan Supreme Court denying leave to appeal is  
reported at 402 Mich 921 (1978) (App. B of Petition).

JURISDICTION

The jurisdictional statement of the Petitioner are adequate.

QUESTIONS PRESENTED

- I. Whether the decision of the Michigan Supreme Court was based  
on independent state grounds.
- II. Whether the decision below was clearly correct.
  - A. Whether there is no showing that the city ordinance is  
constitutional.
  - B. Whether there are no facts which would support a finding that  
the action of the state either complied with the ordinance or the  
Constitution.

STATE OF MICHIGAN  
IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

vs.

No. 7607619

CHARGE: VASA-P

SWORN PETITION OF DEFENDANT

I have no money to hire a lawyer to defend me and petition the court to appoint counsel for my  
defense.

Date: 9-21-76  
Signed and sworn before me this date:

Gary DeFillippo  
Defendant

Address

Phone

Anne McCreary  
Deputy Clerk

NOTICE TO APPOINTING JUDGE

The defendant was arraigned by me on the warrant and made a proper showing of indigency and  
requested appointment of counsel at public expense.

I set examination for 9-30-76 Bond set at Personal

APPOINTMENT OF COUNSEL

I appoint Defender as counsel for the defendant at public expense.

APPEARANCE OF COUNSEL

TO THE CLERK OF THE COURT:

Please enter my appearance as assigned counsel for the defendant.

Signature Myrell Sewell

Printed Name Defenders

Address 462 Grafton

Telephone 965-4384

Michigan State Bar No. 020806

Petition, Order & Appearance of Assigned Counsel

RC Form #15

GREEN - Auditor for Payment

MUST BE PRESENTED FOR  
PAYMENT WITHIN 30  
DAYS AFTER SERVICES.

A TRUE COPY

HARRY Y. DUPLESSIS  
RECORDER'S COURT

Thoni East  
DEPUTY CLERK

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs-

Court of Appeals No. 77-20

GARRY DeFILLIPPO,

Lower Court No. 76-07619  
Defendant-Appellant.

AFFIDAVIT OF APPOINTED COUNSEL

The following docket entries appear in the above case:

1. Date of appointment of counsel: 9/28/76;
2. Date of preliminary examination: 9/30/76;
3. Date of the filing of Motion to Quash the  
Information and suppress the evidence: 10/6/76;
4. Date of Order Denying the Defendant's  
Motion: 12/7/76;
5. Date of Order Staying Proceedings: 12/8/76;
6. Application for Leave to Appeal granted: 6/2/77;
7. Please note that the record upon which this  
appeal is based - the preliminary examination transcript - has  
been filed in this case.

A copy of the Order Appointing Counsel is attached.

DEFENDERS OFFICE LEGAL AID AND  
DEFENDER ASSOCIATION OF DETROIT

BY: Thomas Loeb

THOMAS LOEB (P 25913)  
Attorney for Defendant-Appell  
462 Gratiot Ave.  
Detroit, Michigan 48226  
965-4384

Subscribed and sworn to before  
me this 6 day of June, 1977

Ruth Ann Cawley

Notary Public, Wayne County, Michigan  
My Commission Expires: 7/10/78

A TRUE COPY

HARRY Y. DUPLESSIS  
RECORDER'S COURT

BY: Thomi Sant

DEPUTY CLERK

ORDINANCE

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity. Detroit City Code § 39-1-52.3.

STATEMENT

The statement of facts of the Petitioner are accepted.

ARGUMENT

The issues presented by the Petition do not justify the granting of the Writ of Certiorari. The Petition does not mention that there were independent non-federal grounds for the decision of the Michigan Courts (Issue I, infra). The Petition does not demonstrate that the Ordinance ruled unconstitutional is constitutional (Issue II, A, infra). The Petition does not set forth facts, even if the city ordinance were ruled to be constitutional, sufficient to support the police conduct in this case. (Issue II, B, infra).

I. THE DECISION OF THE MICHIGAN SUPREME COURT WAS BASED ON INDEPENDENT STATE GROUNDS.

The Petitioner seeks Certiorari review of the decision of the Michigan Court of Appeals. (Pet. App. A). However, the review would be of the denial of leave to appeal by the Michigan Supreme Court. (Pet. App. B). The Order stated that Michigan Supreme Court was not persuaded that the issues raised should be reviewed. The Michigan Supreme Court did not issue an opinion. Thus, it is impossible to know whether or not their decision was because the Michigan Supreme Court agreed with the reasoning of the Michigan Court of Appeals or only the result. In either event the decision to deny leave to appeal is supported by independent stated grounds.



Where the decision is based on both state and federal grounds Certiorari review is inappropriate. Fox Film Corp. v Muller, 296 US 207; 56 Sct 183; 80 LEd 158 (1935).

It is important to note that the decision of the Michigan Court of Appeals cited at length from Pinkerton v Verberg, 78 Mich 573, 584; 44 NW2d 579, 582-3 (1889) to support its conclusion that an arrest without probable cause is a violation of the Constitution.

"Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion, -- to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guaranteed." (Pet. A. 14-15).

In addition the Respondent in his brief at both the Michigan Court of Appeals and Michigan Supreme Court raised other issues not discussed by the state courts, which would supply independent state grounds for the result reached.<sup>1</sup>

Thus, if this Court concluded that the Pinkerton decision

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<sup>1</sup>III. The Detroit Stop-Identification Ordinance should be declared void because as an emergency enactment it is pre-empted by the exclusive authority of the governor of the State of Michigan.

VI. Should this court constitutionally uphold the Stop-And-Identify Ordinance, the evidence should still be suppressed, as it was seized pursuant to an illegal search and not pursuant to a permissible limited pat-down or stop and frisk.

was not an adequate state grounds, then the Court should direct the Michigan Supreme Court to decide the other issues raised.<sup>2</sup>

## II. THE DECISION BELOW WAS CLEARLY CORRECT.

### A. THERE IS NO SHOWING THAT THE CITY ORDINANCE IS CONSTITUTIONAL

The reasons set forth by the Michigan Court of Appeals adequately demonstrate the unconstitutionality of the city ordinance. (See Pet. App. P 14-5). Neither the California case nor Terry address all of the grounds relied upon by the Michigan Court of Appeals in holding the city ordinance unconstitutional.

For the same reasons stated by the Michigan Court of Appeals, the city ordinance is unconstitutional.

### B. THERE ARE NO FACTS WHICH WOULD SUPPORT A FINDING THAT THE ACTION OF THE STATE EITHER COMPLIED WITH THE ORDINANCE OR THE CONSTITUTION.

The facts set forth by the Petitioner are that two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. Upon arrival at the alley the officers found respondent and a female who had her pants down. She was intoxicated; respondent did not appear to be so. (Pet. App. p 4).

The city ordinance requires the police officer to have reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity . . . . (Emphasis added).

The facts do not show anything that would allow the police officer to reasonably believe the behavior of the Respondent

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<sup>2</sup>This alternate relief would avoid the result of Mosley v Michigan, 423 US 96, 96 Sct 321, 46 LEd2d 313 (1975) where after this Court reviewed the issue raised, the Michigan Court of Appeals reversed the conviction of the defendant on different grounds. People v Mosley (On Remand), 72 Mich App 289, 249 NW2d 393 (1976). The Michigan Supreme Court then affirmed that reversal on yet other grounds. People v Mosley (On Remand), 406 Mich 181, 254 NW2d 29 (1977).

warranted further investigation. There was no showing that the radio call was reliable. See People v Mosley, (On Remand), 400 Mich 818, 254 NW2d 29 (1977).

Even if the radio call concerning two allegedly drunken people in an alley was from a reliable informant, once the police arrived at the alley and saw that Respondent did not appear to be drunk they had no basis to further investigate him under the ordinance. It is important to note the other person at the scene was arrested immediately for being a disorderly person. Respondent was not arrested immediately.

Anything that the police officers did after they arrived at the scene and determined Respondent did not appear to be drunk was outside the authorization given by the ordinance. Thus, the argument of the Petitioner that the police officers were acting in good faith is without merit. They cannot be found to be acting in good faith on the basis that they were operating on the authority of an ordinance, when their conduct was not even authorized by that ordinance.

In addition any argument that the officers were relying on Terry v Ohio, 392 US 1; 88 Sct 1868; 20LED 2d 889 (1968) is destroyed by a close reading of Terry and its companion case of Sibron v New York, 392 US 40; 88 Sct 1889; 20 LED2d 917 (1968). The frisk allowed after a Terry stop is for the protection of the police officers. Thus, it must be limited to a search for weapons. There was no such limitation in this case, as the police had no reason to believe there was a weapon, especially after the initial frisk on the street.

This case is an example of why this Court should not and has not left the decision of whether or not a search is reasonable or not to the police officer on the street. Clearly a warrant could not have been obtained in this fact situation, because there was no probable cause to arrest. In addition there were no exigent cir-

cumstances present that would have justified an arrest without a warrant. To argue that the police officer was acting in good faith, because the ordinance was not yet held unconstitutional is not appropriate when the conduct of the police officers did not comply with either the ordinance or Terry-Sibron.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

DEFENDERS' OFFICE - LEGAL AID  
AND DEFENDER ASSOC. OF DETROIT

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Thomas M. Loeb  
THOMAS LOEB (P 25913)  
Attorney for Respondent  
462 Gratiot Avenue  
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